STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 17, 2008
v	No. 276276 Cass Circuit Court
JOSHUA GERALD GALLUP, Defendant-Appellee.	LC No. 06-010291-FH

Before: Bandstra, PJ, and Talbot and Schuette, JJ.

PER CURIAM.

The prosecutor appeals as of right the order granting defendant's motion to suppress evidence and subsequent dismissal of criminal charges regarding possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). We reverse and remand.

On November 7, 2006, at approximately 7:30 p.m., Cass County Sheriff's Department detectives, Paul McGowan and Beth Davis, went to a residence located at 24392 Oak Street in Edwardsburg, Michigan to conduct a "knock and talk."[1] The detectives were not in uniform and their badges and weapons were not initially displayed. Detective McGowan was dressed in a denim shirt, which displayed the embroidered logo "Overisal Lumber, SEMCO Windows and Doors."

Detective McGowan knocked on the front door of the residence. Police used a transmitter to record the encounter. After knocking, a male voice from the interior of the residence, later identified as defendant, queried, "Who is it?" McGowan merely replied by stating his first name, "Paul." This exchange occurred two additional times before defendant opened the door. McGowan then inquired whether defendant was the homeowner, which defendant denied. McGowan requested, "Can I come in and talk to you a minute?" Defendant

[1] A "knock and talk" is defined as "a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items." *People v Frohriep*, 247 Mich App 692, 697; 637 NW2d 562 (2001).

responded affirmatively and McGowan, followed by Davis, entered the vestibule of the residence. At this point, before entering any further into the premises, McGowan identified himself and Davis as police officers investigating a complaint regarding the presence of a methamphetamine lab at the residence. Defendant denied the existence of the lab.

McGowan then inquired whether defendant lived at the residence. Although defendant did live in the home, he denied that he was a resident. Six additional individuals were present and McGowan inquired if anyone else was a resident. An unidentified male acknowledged paying rent and to being 21 years of age. This unidentified individual, in response to McGowan's request to "look around" gave unequivocal permission, stating, "[a]ll you want." At no time did the detectives restrict the movement of anyone in the residence, but did request that defendant display his hands, which were initially hidden beneath his jacket. Only after receiving acquiescence to "look around" did the detectives venture further into the home. Accompanied by defendant, the detectives then proceeded to walk through the entire residence. At no time, did defendant indicate that he wished to restrict access to any room or area to the detectives, never asked if they possessed a warrant or in any manner voiced an objection to their presence in the residence.

In a common area of the home, marijuana "shake" was discovered on a coffee table.[2] Upon seeing this residue, McGowan inquired whether any additional marijuana was within the home. Defendant replied affirmatively and pointed to a closed box placed on an end table, next to the couch, in the living room. McGowan opened the box, which contained marijuana.

On December 22, 2006, defendant filed motions seeking a *Walker*[3] hearing and to suppress physical evidence seized by police. In his motion to suppress evidence, defendant asserted police affirmatively misrepresented themselves by wearing a shirt with a SEMCO logo, which defendant interpreted as implying the officers were from the local gas company. Consequently, defendant argued the police did not obtain consent for entry into the residence, thereby negating the validity of the search conducted of the premises.

A hearing was conducted on January 16, 2007. At this time, defendant testified that he believed McGowan was from the local utility company and that he only granted him permission to enter because he was behind in payment of his bills and wished to prevent the gas from being shut off to the residence. Defendant acknowledged that he assumed McGowan was from the utility company, but that the detective did not verbally give any such indication and did, immediately upon entry into the residence, identify himself as a police officer. Defendant denied giving the police consent to search the premises but acknowledged he also did not deny their request to look through the home. Defendant attributed his acquiescence to his belief that because the police "had already entered the house and therefore had the right to search the house, and he was just being courteous by asking."

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[2] McGowan described the "shake" as comprising "some seeds and some stems and a little bit of marijuana."

[3] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

In granting defendant's motion to suppress evidence, the trial court ruled, in relevant part:

> The Court concludes that he gained entry of the property through use of a pretext, that is, by not identifying himself as a police officer and by not having any identifying clothing or insignia, and as he indicated in his testimony, he hoped to gain entry without identification because he was fearful if he did properly identify himself as a police officer he might not get in, and obviously since he did not have any evidence to secure a search warrant, permission at that point would no doubt fail.
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> There's nothing wrong with making contact with the resident here, Mr. Gallup, identifying yourself as a police officer, engaging in a conversation in an effort to secure that consent. However, a pretext entry as we have here implying that you are someone other than the police, and that's exactly what the implication was . . . . Obviously there were plenty of conclusions to be drawn here as explained by the defendant that would vitiate the consent, that does not amount to an unequivocal, understanding, freely-given consent. The consent to entry was based upon a misapprehension as to who this individual was. It doesn't matter that he let somebody in that he thought was something else.
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> Law enforcement has the obligation to secure an appropriate entry, and they did not do that here. After entry, sure, he gives his consent, but by that time the sanctity of the home has been invaded, the constitutional violation poisons all that's followed. The Fourth Amendment is designed to protect us from random, unwarranted searches based perhaps on unfounded information. It turns out some of the information here may have been unfounded, that is, that there was a meth lab operating at that residence.

Based on the trial court's determination that the prosecutor failed to meet its burden regarding the demonstration of "unequivocal consent," all evidence seized and any statements made were suppressed. An order memorializing the trial court's ruling was entered on January 29, 2007.

In *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004), this Court affirmed the standard of review used in *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001), for suppression of evidence, stating:

> We review a trial court's findings of fact for clear error, giving deference to the trial court's resolution of factual issues. "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." We overstep our review function if we substitute our judgment for that of the trial court and make independent findings. However, we review de novo the trial court's ultimate decision on a motion to suppress. [Internal citations omitted.]

Constitutional issues are also reviewed de novo by this Court. *Id.* at 696.

Initially, we note that the trial court misconstrued the nature of defendant's challenge to the behavior of the detectives as requiring the clear delineation of the parameters for use of the "knock and talk" as a police methodology for initiating communication or interaction with an individual regarding suspected criminal activity. Specifically, the trial court's ruling suggests that for a "knock and talk" to be valid, police were required to identify themselves prior to gaining entry in order to obtain valid consent to a subsequent search of defendant's residence. While we concur with the trial court's concern regarding the importance of protecting Fourth Amendment rights and the necessity that a proper exception to a warrantless search of a home exist before breaching the sanctity of a residence, we believe that the issue involved in this matter can be resolved solely on the basis of the validity of the consent obtained and does not require the establishment of any "bright-line" rules regarding use of the "knock and talk" procedure.

Our analysis must begin with the recognition that the United States and Michigan Constitutes both preclude unreasonable searches and seizures, US Const Am IV; const 1963, art 1, § 11, and the incontrovertible premise that:

> A warrantless search and seizure is per se unreasonable unless shown to fall within one of the various exceptions to the warrant requirement. When consent is alleged, the burden is on the prosecution to prove by clear and positive evidence that the consent was unequivocal and specific, freely and intelligently given. Whether a consent is valid is a question of fact to be decided upon the evidence and all reasonable inferences drawn from it. The totality of the circumstances must be examined. [*People v Brown*, 127 Mich App 436, 440-441; 339 NW2d 38 (1983) (internal citations omitted).]

In addition, as this Court recognized in *Bolduc, supra* at 438:

> In order for any police procedure to have constitutional search and seizure implications, a search or seizure must have taken place. As the Sixth Circuit Court of Appeals explained, "[t]he safeguards of the constitution, with respect to police/citizen contact, will vest only after the citizen has been seized." The Sixth Circuit Court of Appeals agreed that "'voluntary cooperation of a citizen in response to non-coercive questioning [raises no constitutional issues.]'" [Internal citations omitted.]

The test typically used to determine what constitutes a seizure is whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 438 (citation omitted). It is further acknowledged that an individual's home or residence "garners special consideration in the law," and that "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Id.* at 439-440 (citations omitted). This Court has already determined, within the context of a "knock and talk" procedure, that "the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections." *Frohriep, supra* at 698. However, this determination does not suggest that constitutional implications cannot arise depending on how this procedure is used by police because "whenever the procedure is utilized, ordinary rules that govern police conduct must be applied to the circumstances of the particular case." *Id.* at 698-699. In this instance, we

are required to evaluate the method used by police to gain entry and whether valid consent was obtained to conduct the subsequent search.

The trial court's ruling indicates that its decision to suppress the evidence stemmed from its determination that the police impliedly violated the "knock and talk" procedure by failing to identify themselves before being admitted to the residence and that their engaging in a form of subterfuge to gain entry served to "vitiate" the validity of any consent obtained. We note that this ruling is based on defendant's mistaken belief that the shirt worn by McGowan, embroidered with the name "SEMCO," indicated his affiliation with a local utility company, which went uncorrected until defendant permitted the detective entry into the residence. Contrary to the trial court's ruling, the *Frohriep* Court in determining the validity of the "knock and talk" procedure did not specifically indicate at what point when initiating contact with a citizen that police must identify themselves. Notably, in *Frohriep* this Court found:

> The police action, i.e., approaching defendant as he was standing in his yard, did not amount to a seizure of defendant. The police simply identified themselves, told defendant they had been informed that he had controlled substances on his property, and asked defendant's permission to "look around." There is no indication that defendant was not free to end the encounter. Indeed, the testimony at the suppression hearing does not support the notion that defendant felt threatened or coerced. Thus, the initial contact with defendant did not have any constitutional implications on the basis of a seizure because there is no indication that any seizure of defendant occurred. [*Frohriep, supra* at 701.]

A reading of the excerpt, *supra,* from *Frohriep* does not imply that the manner of entry onto a defendant's property is dispositive of the effectuation of a seizure, but rather it is the conduct of police after identifying themselves and stating the purpose of their presence, which determines the nature of the encounter. Based on the facts and circumstances of this appeal, we determine that a seizure did not occur. Other than requesting that defendant initially display his hands, while in the entryway of the home, the police did not direct, demand or restrict defendant's behavior or movement. Defendant acknowledged that the detectives did not threaten him and requested permission to search the premises. Defendant did not assert his cooperation was coerced by police through any physical or verbal threat, but rather merely that he assumed, based on entry, that they "had the right to search the house" and were only "being courteous by asking." The assertion by defendant that police were "being courteous" is directly contrary to any suggestion or interpretation of their actions as constituting a threat or coercion.

In addition, we emphasize that any constitutional implications that arise are subject to evaluation based on the "ordinary rules that govern police conduct . . . applied to the circumstances of the particular case." *Frohriep, supra* at 698-699. We address the issue surrounding the means effectuated by the detectives for entry consistent with case law pertaining to undercover police officers and evidence seized under the "plain view doctrine." In *People v Catania,* 427 Mich 447; 398 NW2d 343 (1987), police gained entry into the defendant's residence by feigning car trouble and providing a false name. While inside the residence and using the telephone based on this pretext, the defendant displayed suspected marijuana. The officer, without identifying herself continued to engage the defendant in conversation regarding access or availability of drugs. The officer was in the defendant's home for approximately one-half hour and did not reveal her identity. Subsequently, based on the information obtained,

police secured a search warrant, which led to the defendant's conviction for possession with intent to deliver cocaine and marijuana. *Id.* at 450-452. The Court concluded:

> The entry of [the police officer] into [the defendant's] home without a warrant was not a "search" under either the Fourth Amendment of the United States Constitution or art. 1, § 11 of the Michigan Constitution. [The police officer] entered the home with [the defendant's] permission, albeit for a hidden purpose. While in [defendant's] home, [the police officer] did not exceed the scope of the invitation extended by [defendant]. There was no forcible entry effected or attempted by exercise of governmental authority or power. [*Id.* at 468.]

The Court specifically relied on its determination that

> [T]here was no assertion of right, contractual, governmental or otherwise, to entry by the undercover agent. She claims she had car trouble. She asked to enter to use the phone and was allowed in. "Therefore, this Court finds nothing which would constitute an unreasonable search in this case on this record." [*Id*. at 467-468]

We note that, in this case, there was no overt misrepresentation by police regarding their identity. Rather, there was merely an emblem on the detective's shirt and defendant's assumption of their purpose and identity. Unlike *Catania*, the detectives did not prolong any deception or subterfuge and immediately identified themselves as police officers upon crossing the threshold of the residence. Such ruse entries do not automatically raise a constitutional issue per se. Rather, in order to withstand a Fourth Amendment challenge to a ruse entry into a residence without a warrant, there must be a demonstration that a rational basis existed to suspect criminal activity was occurring within the home. *Catania*, *supra* at 478 (Archer, J, dissenting). Specifically:

> Entries without warrants effectuated by ruse which are not based on objective and articulable facts concerning suspected criminal activity, constitute arbitrary intrusions which cannot be tolerated under the Fourth Amendment or Const 1963, art 1, § 11. [*Id.*]

In this instance, defendant does not challenge the alleged basis for the contact by police to investigate reports pertaining to the existence of a methamphetamine laboratory on the property. Given the existence of an "objective and articulable" basis for the ruse entry, we find there is no constitutional violation.

Having determined that the entry was not objectionable or unconstitutional we turn next to an evaluation of whether the consent obtained to conduct the search of the home was voluntary. The trial court appears to have two concerns regarding the consent to search the premises. First, it noted that the prosecution failed to identify the individual providing the verbal consent to search. Notably, defendant does not contend that this individual was not authorized to

consent to the search.[4] The second issue, which we have addressed, *supra*, concerns the voluntary nature of the consent following what the trial court construed to be an improper entry into the residence.

We would first note that a third-party who maintains an equal right of control or possession over premises can consent to a search, *People v Grady*, 193 Mich App 721, 724; 484 NW2d 417 (1992), and a defendant assumes the risk that a co-tenant may provide such consent, *People v Goforth*, 222 Mich App 306, 311-312; 564 NW2d 526 (1997). Interestingly, defendant does not assert that the unidentified individual was incapable or unauthorized to provide consent for a search, it was merely the failure of police to identify this individual that prompted the trial court's concern. As indicated by this Court:

> The Fourth Amendment generally prohibits the entry without a warrant of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises. [*People v Grady, supra* at 724 (citations omitted).]

Consequently, even if the detectives erred in believing the unidentified individual had authority to consent to the search of the premises, a reasonable belief by the officers regarding this individual's authority "does not violate the Fourth Amendment proscription of unreasonable searches and seizures." *Id.*

However, we find that an alternative basis exists to determine, based on the totality of the circumstances, that defendant provided valid consent to the search. At the hearing, defendant implied that he assumed police, once in the home, had a right to conduct a search. While this assumption was incorrect, it was not necessary that the prosecution demonstrate defendant knew he had a right to refuse permission to conduct the search. *Brown, supra* at 441.

In addition, "conduct itself can, under proper circumstances, be sufficient to constitute consent." *Brown, supra* at 441. For consent to be valid the prosecution must demonstrate that it was made without coercion and must be unequivocal, specific, and freely and intelligently given. *People v Farrow*, 461 Mich 202, 206; 600 NW2d 634 (1999). Express verbal permission is not required for a defendant's consent to search the premises to be valid. Rather, an individual's conduct may be deemed sufficient to show that consent was given both freely and voluntarily given. *Brown, supra* at 441.

Defendant acknowledged that he never verbally refused the detectives permission to search the residence. Although, defendant falsely denied to police his status as a resident and, thus, his authority to permit the search, there is no question that defendant did possess such authority. Defendant also did not object to the permission given by the unidentified individual to search the premises. Although not requested by detectives, defendant accompanied officers

[4] In making this observation, we do not suggest a shifting of any burden of proof to defendant.

throughout the home and voiced no objection to their entry into any room or area. Further, while in a common area of the home, defendant responded to a verbal inquiry by detectives regarding the presence of additional contraband. Defendant does not indicate he was subjected to any threat or coercion by the detectives and voluntarily pointed to a closed container, which did contain marijuana. As a result, defendant's conduct implied that he freely consented to the search by volunteering the contents of the closed container for inspection.[5] Defendant had ample opportunity to limit the scope of his consent by not voluntarily disclosing the contents of the container or by stopping the detectives from searching any further at any time during the encounter. Defendant exercised neither option. As a result, we find that defendant's conduct reflected a knowing and voluntary consent to search the premises.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette

[5] "There exists a somewhat special category of cases . . . in which courts are inclined to speak in terms of consent notwithstanding the fact that the person allegedly consenting has never explicitly stated that he is willing to allow the authorities to search his person, premises or effects. Often it is said that the consent is 'implied' because it is found to exist merely because of the person's conduct in engaging in a certain activity." *People v Greene,* 465 Mich 924, 925-926; 636 NW2d 270 (2001) (Corrigan, CJ, dissenting), citing 3 LaFave, Search & Seizure, § 8.2(*l*), pp 695-696.